UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 771

Case No. 839: D'CRUZ

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, at the request of Cleophus D'Cruz, a staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 31 October 1994, 31 January and 30 April 1995;

Whereas, on 14 February 1995, the Applicant filed an application requesting the Tribunal, inter alia, to take certain preliminary measures, to call certain witnesses and to order the production of certain documents, and:

> "[To be granted] an appropriate status and level of earnings, at the P4/P5/D1 [level], and to be exceptionally groomed for functions relative to the above; installation to be effective retroactive [to] 1990, given the reasonable span from June 1982 to the present during which time my then newly acquired skills could have been employed, observed, and assessed, in a practical environment conducive to demonstrable skills. I also request a sabbatical for a Post Graduate Doctoral Programme and Research Project, **vide ST/IC/1993/69 dated 15 December 1993**.
>
> Additionally, I would like 6 months - 1 year full time devotion to a refresher in and preparation for, a French Language Proficiency, **vide ST/AI/281/REV.1, para. 14, dated 9 April 1990**, and the opportunity to achieve a fair level of

Computer literacy, and whatever is necessary to return me to a competitive status by Organizational requirements, **vide again ST/AI/281/Rev.1, para. 3.**

...

[and]

1. If proved that Forgery, Fraud, and Complicity, prevailed, then I recommend full retribution be applied to the individuals concerned, and additional serious consideration be given to culpability with respect to Tort and Libel.

...

Additional compensation specific to aggravated assault on career opportunities, character assassination, and pain and suffering caused by reduced earning potential, and ultimately the public humiliation associated with my suspension and the overwhelming UN Security presence ...

..."

and

"[The payment of an unspecified amount of compensation for various losses and damages suffered and reimbursement for certain expenses related to his appeal.]"

Whereas the Respondent filed his answer on 21 March 1995;

Whereas, on 17 April 1995, the Applicant submitted a request for the production of documents, and on 8 May 1995, the Respondent submitted comments thereon;

Whereas, on 2 June 1995, the Applicant again submitted his request for the production of documents and, on 13 June 1995, the Respondent submitted comments thereon;

Whereas the Applicant filed written observations on 30 October 1995;

Whereas, on 7 and 24 June 1996, the Applicant submitted additional comments and documents;

Whereas, on 4 July 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, on 4 July 1996, the Tribunal requested the production of documents from the Respondent, which he provided on 11 July 1996, with a request that they "be reviewed in camera" upon the condition that they not be made available to the Applicant;

Whereas, on 16 July 1996, the Tribunal refused to accept the Respondent's conditions and transmitted the documents to the Applicant;

Whereas, on 23 July 1996, the Tribunal rejected a request by the Applicant that the Tribunal reconsider its ruling on oral proceedings;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 14 September 1970, as a Clerk in the Bureau of Administrative Management and Budget at the G-2 level, on a three month fixed-term appointment. On 14 December 1970, he was granted a probationary appointment and on 1 September 1972, a permanent appointment, his entry grade having been reclassified to the G-3 level. On 1 July 1976, his functional title became Accounts Clerk, and he was assigned to the Accounts Section, Division of Finance. On 1 January 1978, he was promoted to the G-4 level. With effect from 1 January 1985, the Applicant's post was reclassified, and he was promoted to the G-6 level. In October 1985, he was assigned to the Agency Accounts Unit. From August 1987 to September 1989, the Applicant was assigned to the Travel Accounts Task Force. Thereafter, he returned to the Agency Accounts Task force. On 15 September 1993, the Applicant was suspended with pay for three months. The suspension was extended through 30 April 1994. On 26 September 1994, the Applicant was temporarily assigned to the Division of Personnel (DOP) as an Account Assistant.

In a memorandum dated 4 January 1991, the Chief of the Agency Accounts Unit, advised the Chairman of the Management Review Panel of the Division of Finance (DOF) that the Applicant refused to participate in the Performance Appraisal Review (PAR) exercise. On

31 January 1991, the Management Review Panel, noting that the Applicant's supervisor had given him a 4 rating in his PAR, concluded that "in view of his poor performance, bad attitude to work and refusal to participate in the PAR process that a 5 rating is justified". He recommended that "consideration be given to DOP initiating discussions as to separation from service".

On 9 April 1991, the Applicant expressed to the Assistant Administrator and Director, Bureau for Finance and Administration (BFA), DOF, his concerns regarding the PAR process, adding: "The rating of 5 is in no way the least bit a reflection on me as it is on those who have conducted this poor apology for a managerial/ administrative process".

On 24 May 1991, the Assistant Administrator advised the Director, DOP, "In view of the staff member's obdurate position and intemperate language, I believe that it is imperative to act swiftly to resolve this issue.".

On 7 June 1991, the Director, DOP, recommended to the UNDP Appointment and Promotion Panel that the Applicant's appointment be terminated for unsatisfactory service, noting that "beginning in April 1989, there has been a steady deterioration in his performance and attitude toward his work, his supervisors and the BFA management".

The Applicant's case was referred to a Joint Review Body (JRB). On 16 April 1992, the Director, DOP, informed the Applicant that "upon the advice of the Joint Review Body, the Administrator decided not to terminate your permanent appointment with UNDP". He had, however, instructed the Director to formally reprimand the Applicant for refusing to participate in the 1990 PAR process and for "use of insulting language in addressing management". The Director further stated that, based on the 1991 PAR process, in which the Applicant had refused to participate, his case "is being resubmitted to the Joint Review Body for the purpose of considering the termination of your permanent appointment for unsatisfactory service."

In a reply dated 30 April 1992, the Applicant requested a copy of the JRB report from the Appointment and Promotions Board. The report was not made available.

On 9 July 1992, the Applicant's case was again submitted to the Appointment and Promotion Panel with a request to convene a joint review body. On 12 April 1993, the UNDP Administrator informed the Applicant that, on the advice of the JRB, he had decided against termination of his services. He noted the Applicant's "utter lack of cooperation", citing his refusal to participate in the PAR process, his use of insulting language in communications with management, and his refusal to meet with the Director, DOP. He informed the Applicant that he had decided to reassign him outside the DOF.

On 12 April 1993, the Applicant wrote to the Secretary-General requesting permission to present his case directly to the Administrative Tribunal. On 4 May 1993, this request was denied.

On 27 July 1993, the Chief of Staffing, DOP, informed the Applicant that his post was to be abolished and that he was to meet with a representative of DOP, no later than 28 July 1993, to indicate other posts for which he wished to be considered. In his reply dated 28 July 1993, the Applicant stated "I can only conclude that this is yet another feature in the continuing saga of harassment."

On 23 August 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB), alleging unfair treatment by UNDP and contesting his reassignment and the abolition of his post.

On 15 September 1993, the Officer-in-Charge, DOP, informed the Applicant that he was charged with misconduct under Staff Rule 110.1, for insubordination and use of insulting language, and that he was suspended from duty with pay, pending the investigation of the charges against him. He was instructed to surrender his access card and grounds pass immediately and not to enter UNDP premises without written permission. On 16 September 1993, the Director, DOP, informed the Applicant that his refusal to leave

UNDP premises following his suspension, and his refusal to surrender his access card and grounds pass, constituted serious misconduct. Should the Applicant again enter the premises of UNDP without written permission, he would be summarily dismissed.

On 17 September 1993, the Applicant appealed to the JAB for suspension of action of the above-mentioned decisions. One hundred and fifty nine colleagues of the Applicant signed an open letter, dated 30 September 1993, stating "to our knowledge [the Applicant] has never been a threat to the organization, its properties, his superiors or any of his colleagues".

On 8 October 1993, the JAB adopted its report on the request for suspension of action, concluding "The Panel does not recommend [the Applicant's] suspension with pay. It does recommend, however, that every effort be made to expedite both the appeal and the investigation". On 21 October 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB's report and informed him that the Secretary-General "has decided not to grant your request for suspension of the decision to suspend you from duty with UNDP with pay pending an investigation of charges made against you". She further stated that the Secretary-General accepted "the Board's recommendation that every effort be made to expedite both the appeal and the investigation ..."

On 25 January 1994, the JAB adopted its report. It recommended that the Applicant "be maintained on a core post, until the completion of the disciplinary proceedings referred to in the letter of 15 September 1993". On 25 February 1994, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has examined your case in the light of the Board's report and has noted its finding that your appeal was receivable. He has also noted the Board's concerns regarding the handling of your case and its discussion of the totality of your service with UNDP. He has also noted the Board's recommendation that you be maintained

on a core post until the completion of the disciplinary proceedings in your case.

The Secretary-General is aware that your former core post was abolished at the end of 1993. He has decided not to take any action regarding placing you against another core post at this point. The proceedings in your disciplinary case are in progress and, until their completion, UNDP will maintain your full pay status."

On 4 March 1994, the Disciplinary Committee transmitted its report to the Administrator. Its findings and conclusion read, inter alia, as follows:

"12. The Committee decided that the present case is not a clear-cut case. Therefore, it recommends to the Administrator that the s/m [staff member] be given a last fair chance. The Committee would furthermore suggest that UNDP management convey to the s/m that this recommendation has been made in the hope that he fully recognizes his obligation - under Staff Regulation 1.2 - to act in conformity with the requirements of the Organization.

13. Should the s/m reject this offer of a last fair chance and continue to be defiant and inflexible, the Committee would recommend his separation (with notice) from UNDP service." (emphasis in original).

On 28 April 1994, the Director, DOP, transmitted to the Applicant a copy of the Joint Disciplinary Committee report and informed him that the Administrator had decided to accept the Committee's recommendation that he be given "a last fair chance", but noting "I must remind you that should you maintain a defiant attitude he will have no option but to proceed with your separation from UNDP". He informed the Applicant that his suspension would end on 30 April 1994 and instructed him to report to a Staffing Specialist, on 2 May 1994 "in order to review the plans for your reassignment." On 26 September 1994, the Applicant was temporarily assigned to DOP as an Account Assistant.

On 14 February 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The submission of the Applicant's case to the JRB violated the Applicant's due process rights. Submission of the case twice constituted "double jeopardy".

2. The Applicant received improper notice of the abolition of his post.

3. Suspension of the Applicant was carried out in violation of the staff rules.

4. The Applicant has been subjected to a hostile environment and to discriminatory treatment.

Whereas the Respondent's principal contentions are:

1. Assignment of staff is at the discretion of the Secretary-General. The Applicant has not discharged the burden of proving that his re-assignment was improperly motivated.

2. The Secretary-General's decision to end the Applicant's suspension and to give him another chance by assigning him new tasks was a valid exercise of discretion, in favour of the Applicant.

The Tribunal, having deliberated from 4 July to 2 August 1996, now pronounces the following judgement:

I. The Applicant entered the service of UNDP in September 1970. In 1972, he was granted a permanent appointment. Having served in the Agency Accounts Unit, the Applicant was assigned for several years to the Travel Accounts Task Force. In 1989, he returned to the Agency Accounts Unit.

II. In 1990 and in 1991, the Applicant refused to participate in the Performance Appraisal Review (PAR) process. He was highly critical of the PAR process, as well as of UNDP management. Twice, the Applicant's case was submitted to a Joint Review Body (JRB) to

consider the termination of his appointment, and twice, in 1992 and in 1993, the JRB recommended against termination. On 27 July 1993, the Applicant was informed that his post would be abolished, and he was asked to indicate his preference for an alternative assignment. The Applicant took this as "yet another feature in the continuing saga of harassment". On 23 August 1993, he lodged an appeal with the Joint Appeals Board (JAB), alleging unfair treatment and contesting his reassignment and the abolition of his post.

III. On 15 September 1993, the Applicant was suspended from duty, with pay, and charged with insubordinate behaviour and use of inappropriate language. A disciplinary proceeding was then instituted before the Joint Disciplinary Committee (JDC). The JAB, in considering the Applicant's appeal, took note of the disciplinary proceedings, which had commenced and recommended, in January 1994, that the Applicant be maintained on a core post until the completion of these proceedings. The Secretary-General did not accept the JAB's recommendation. The JDC in its report of March 1994, recommended that the Applicant be given "a last fair chance". The Applicant's suspension with pay was lifted and he was asked to report for duty on 2 May 1994.

IV. The Applicant appeals to the Tribunal from the Secretary-General's decisions on both the JAB and the JDC's recommendations. His pleas appear to consist mainly of a request to remain in his former post, arguing that, if he were placed in another post, this would constitute a sanction. He further argues that the manner in which he was treated is evidence of prejudice. The Applicant also argues that the submission of his case, twice, to the JRB constituted "double jeopardy", and that he should have been provided with a copy of the reports of the JRB. He claims he was given improper notice of the abolition of his post and that he was subjected to a hostile work environment.

V. The JDC was unable to attribute sole responsibility to the Applicant for problems related to him. The Tribunal notes that the Applicant used unnecessarily strong language, and that he refused to cooperate in the PAR process. The Tribunal is, however, unable to determine, from the record, the cause in the Applicant's change of behaviour after eighteen years of excellent service with the Organization.

VI. It appears that the Applicant holds firmly to the objective of reinstatement in his former post. However, the Tribunal notes that this post has been abolished. The Applicant may believe that the abolition of the post was motivated by prejudice against him, but he has not adduced sufficient evidence to prove it. Cf. Judgements No. 312, Roberts (1983) and No. 428, Kumar (1988). The Administrator did offer him the opportunity to seek an alternative assignment, both at the time the post was abolished and, again, following the JDC's recommendation to give the Applicant a last fair chance. The JAB reviewed the procedure followed by UNDP in the abolition of posts, including the Applicant's post, and it found that the staff rules had been observed. The Tribunal concurs in the JAB's conclusion.

VII. In this case, it appears to the Tribunal that, despite the difficulties of the past several years, the Respondent is willing to reintegrate the Applicant into service and has made some effort to do so. In the Tribunal's view, the Applicant should make a good faith effort to work with the Respondent in this endeavour. The Applicant has no right to assignment to a particular post, and the abolition of his post was carried out in accordance with the relevant procedures. Although the Tribunal notes that the Applicant's recent work environment has been characterized by conflict and hostility, it does not find conclusive evidence that the Respondent was entirely responsible for this environment, as the Applicant was unwilling to cooperate in the management process.

The JRB, in its report of 28 October 1992, aptly summarized this case as "one of misunderstanding between various parties where it becomes more and more difficult to break a vicious circle and to discern between the causes and the effects". The Tribunal reiterates that the Applicant should cooperate with the Respondent, in the interest of the proper functioning of the Organization.

VIII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

Geneva, 2 August 1996

R. María VICIEN-MILBURN
Executive Secretary